

**PD-0347-15**

**In the  
Court of Criminal Appeals of Texas  
At Austin**

FILED  
COURT OF CRIMINAL APPEALS  
3/22/2017  
ABEL ACOSTA, CLERK

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**Appellate No. 09-13-00090-CR**

**In the Court of Appeals for the Ninth District**

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**Michael Wayne Bohannon, Appellant**

**v.**

**The State of Texas, *Appellee***

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**APPELLANT'S BRIEF**

**ON PETITION FOR DISCRETIONARY REVIEW**

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**Richard Martin P. Canlas  
Attorney for Appellant Michael Wayne Bohannon  
State Bar Card No. 90001843  
300 West Davis, Suite 400  
Conroe, TX 77301  
936-788-6999  
r.canlas.equire@gmail.com**

**ORAL ARGUMENT NOT PERMITTED**

## **IDENTITY OF THE PARTIES AND COUNSEL**

JUDGE: Honorable Lisa Michalk,  
S/A Judge Presiding  
435<sup>th</sup> District Court  
Montgomery County Courthouse  
207 West Phillips  
Conroe, TX, 77301

FOR THE STATE: Montgomery County District Attorney's Office  
207 West Philips, 2<sup>nd</sup> Floor  
Conroe, Texas 77301

TRIAL PROSECUTOR: Mr. James V. 'Jim Prewitt'  
SBN 16280505  
Montgomery County Assistant District Attorney

Ms. Shanna R. Redwine  
SBN 24072670  
Montgomery County Assistant District Attorney

APPELLATE LAWYER: Mr. William Delmore, III  
SBN 05732400  
Montgomery County Assistant District Attorney

STATE PROSECUTING ATTORNEY: Lisa McMinn  
P. O. Box 13046 Austin, Texas 78711-3046

APPELLANT: Mr. Michael Wayne Bohannon

TRIAL LAWYER Mr. Earl L. Pryor  
SBN 24011470

Ms. Tiffany L. Wade  
SBN 24042108

300 West Davis, Suite 400  
Conroe, Texas 77301

APPELLATE LAWYER:

Mr. Richard Martin P. Canlas  
SBN 90001843  
Richard Canlas, Esq.  
300 West Davis, Suite 400  
Conroe, Texas 77301

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## **STATEMENT OF THE CASE**

Michael Wayne Bohannon, “(Appellant,)” appeals his conviction, in cause 12-10-109353CR, for the offense of violating the requirements of a civil commitment as a sexually violent predator (C.R. 12-13). The charged indictment included allegations of three prior felony convictions. *Id.* The appellant entered a plea of not guilty; and a jury found him guilty as charged, found the enhancement paragraphs of the indictment to be true, and assessed the appellant’s punishment at imprisonment for life (C.R. 275, 280-282, 290-291). Appellant timely filed his notice of appeal. (C.R. 301). The 9<sup>th</sup> Court of Appeals affirmed the conviction. *Bohannon v. State*, No. 09-13-00090-CR, 2014 Tex. App. LEXIS 11825 (App.—Beaumont Oct. 29, 2014). This Honorable Court, on its own motion, granted discretionary review on November 2, 2016.

## **ORAL ARGUMENT**

Per this Honorable Courts’ order oral argument will not be permitted.

## **ISSUE PRESENTED**

Can a conviction for violating a civil commitment order be upheld when the underlying commitment order has been reversed on appeal?

## **STATEMENT OF FACTS**

In Appellant's case, he was convicted for violating a civil commitment order, but before trial, the underlying judgment and civil commitment order serving the basis for his conviction was reversed on appeal.

### **A. Cause number 08-07-06907-CV, Former underlying Judgment and Civil Commitment Order**

On January 22, 2009, Appellant was formerly found to be a "Sexually Violent Predator" ("SVP") as defined by Texas Health & Safety Code § 841.003, the 435<sup>th</sup> District Court in cause number 08-07-06907-CV entered a judgment and an order of civil commitment ("J & OCC"). (v 3 R.R. 22; S#1,2). The judgment and order of civil commitment from this cause serves as the basis for Appellant's indictment and conviction for violation of civil commitment order, in NO. 12-10-10953-CR, the case on review now. (C.R. 12-13, 267-275, 280-282).

**Before the start of trial on February 11, 2013, in the instant case, the "J & OCC" were vacated by the higher courts. (v1 R.R. 1). On direct appeal, July 22, 2010, the 9<sup>th</sup> Court of Appeals reversed the "J & OCC," and remanded for a new trial;** and on August 31, 2012,

the Texas Supreme Court affirmed the 9<sup>th</sup> Court's judgment. *In re Bohannon*, 379 S.W.3d 293, 300 (Tex. App.—Beaumont 2010) *aff'd*, 388 S.W.3d 296 (Tex. 2012), *cert. denied*, 133 S.Ct. 2746 (2013); (C.R. 232, D#36, v5 R.R. 93-95). **Mandate issued on January 18, 2013.** (D #37; v2 R.R. 19; v5 R.R. 218-221).

### **B. Indictment(s)**

Appellant was indicted for violating the civil commitment order mentioned above in cause number 08-07-06907-CV. The record indicates an indictment from Tarrant county NO. 1152110 dated April 27, 2009, and it was dismissed December 8, 2010, after the 9<sup>th</sup> Court of Appeal reversed and remanded the underlying judgment and order. (C.R. 235,246-247). Prosecution was later taken up by Montgomery County, while the predicate "J & OCC" from NO. 12-10-10953-CR was reviewed by the Texas Supreme Court, indictments were filed on April 21, 2011 in NO. 11-04-04462-CR and re-indicted on October 16, 2012 in NO. 12-10-10953-CR. (C.R. 12-13, 248-249). All of the violations listed in the indictment for violating the "OCC" are alleged to have occurred from February 14, 2009 to April 24, 2011 while Appellant's appeal was pending. *Id.*

### **C. Trial**

At the time of trial, the “J & OCC” from cause number 08-07-06907-CV was reversed and vacated, and Appellant was not legally adjudicated as a “sexually violent predator”. (v2 R.R. 17). Nonetheless, on February 12, 2013, Appellant was held criminally responsible and convicted for violating an invalidated civil commitment order. (C.R. 275).

### **SUMMARY OF ARGUMENT**

The underlying judgment formerly adjudicating Appellant a “sexually violent predator” and order of civil commitment in cause number 08-07-06907-CV which serve as the basis for Appellant’s conviction were reversed on appeal. Mandate issued before trial started in the case at bar, as a matter of law, per the reversal the underlying judgment and order of civil commitment were vacated, no subsequent adjudication was entered. Consequently, Appellant’s conviction should not be upheld because the criminal conviction is void; because the trial court lacks jurisdiction due to the fact that the acts described in the indictment do not constitute a criminal offense without a valid judgment adjudicating Appellant a “sexually violent predator” and order of civil

commitment in cause number 08-07-06907-CV, and, in the alternative the evidence is legally insufficient to support conviction since the judgment and civil-commitment order were invalidated. Additionally, to uphold the conviction would violate Appellant's Due Process and Due Course of Law rights under the United States and Texas Constitutions.

### **ARGUMENT**

Since, the underlying former judgment adjudicating Appellant a "sexually violent predator" ("SVP") and order of civil commitment ("J & OCC)" in cause number 08-07-06907-CV, which serve as the basis for Appellant's conviction, were ***reversed on appeal, with mandate issued before trial*** (*In re Bohannon*, 379 S.W.3d 293, 300 (TEX. APP.—Beaumont 2010) *aff'd*, 388 S.W.3d 296 (TEX. 2012), *cert. denied*, 133 S.Ct. 2746 (2013)), the Appellant's conviction should not be upheld because the trial court: (1) did not have jurisdiction, (2) the evidence was legally insufficient to support conviction, and (3) the process was otherwise fundamentally unfair and violates Appellant's rights.

## A. Criminal Offense

Texas Health and Safety Code § 841.085 states the criminal offense in issue:

### **Criminal Penalty; Prosecution of Offense.**

- (a) A person commits an offense if, after having been adjudicated and civilly committed as a sexually violent predator under this chapter, the person violates a civil commitment requirement imposed under Section 841.082(a)(1), (2), (4), or (5).
- (b) An offense under this section is a felony of the third degree.

**\*\*\* emphasis added \*\*\***

## B. Effect of Reversal

As a matter of law, before trial started, the required elements of “after having been adjudicated,” “as a sexually violent predator,” and “a civil commitment requirement imposed”; cannot be proven, the previous judgment adjudicating Appellant a “sexually violent predator” (“SVP”) and order of civil commitment (“J & OCC”) in cause number 08-07-06907-CV was reversed and vacated for a new trial because of harmful error. *In re Bohannan*, 379 S.W.3d 293, 300 (Tex. App.—Beaumont 2010) *aff’d*, 388 S.W.3d 296 (Tex. 2012), *cert. denied*, 133 S.Ct. 2746 (2013).

### C. No Jurisdiction

The trial court did not have jurisdiction because, the predicate civil judgment to the violation alleged, judgment adjudicating Appellant a “sexually violent predator” and order of civil commitment in cause number 08-07-06907-CV, **was reversed on appeal, prior to trial, the indictment did not contain a felony offense.** Appellant presented this argument in a Motion to Quash stating that there was no criminal offense; and was overruled by the trial court. (C.R. 225-237; v2 R.R. 12,30). On review, the Court of Appeals did not address the Motion to Quash citing failure to preserve error. *Bohannon v. State*, No. 09-13-00090-CR, 2014 Tex. App. LEXIS 11825 (App.—Beaumont Oct. 29, 2014) (Memorandum Opinion pg 7). However, it is well-settled that a jurisdictional challenge may be raised for the first time on appeal. *Cook v. State*, 902 S.W.2d 471, 480 (TEX. CRIM. APP. 1995)

valid **indictment** is essential for jurisdiction, it is not subject to waiver. *Crawford*, 624 S.W.2d at 907; and, *Lackey v. State*, 574 S.W.2d 97, 100 (TEX.CR.APP. 1978).

As required by Texas Constitution Article V § 12(b), the indictment failed to present an offense. When the Motion was presented to the trial

court, the indictment did not state a criminal offense because as matter of law there was no valid judgment and order of civil commitment entered in Cause Number 08-07-06907-CV. The trial court, the 435<sup>th</sup> district court, *should have never let Appellant's case go to trial* because it did not have jurisdiction absent a valid judgment that Appellant was a sexually violent predator and resulting order of civil commitment in cause number 08-07-06907-CV. It is necessary to clearly state a felony grade offense or otherwise trigger the trial court jurisdiction under Texas Code of Criminal Procedure Article 4.05.

**Art. 4.05. Jurisdiction of District Courts.**

District courts and criminal district courts shall have original jurisdiction in criminal cases of **the grade of felony**, of all misdemeanors involving official misconduct, and of misdemeanor cases transferred to the district court under Article 4.17 of this code.

TEX. CODE CRIM. PROC. ART. 4.05 (Enacted by Acts 1965, 59th Leg., ch. 722 (S.B. 107), § 1, effective January 1, 1966; am. Acts 1983, 68th Leg., ch. 303 (S.B. 1), § 5, effective January 1, 1984.)

The indictment does not state a felony grade offense or otherwise trigger jurisdiction under Article 4.05; and, therefore, the trial court did

not have jurisdiction. Appellant's conviction should not be upheld because the indictment should have been set aside prior to trial.

#### **D. Insufficient Evidence to Support Conviction**

Appellant's conviction should be overturned because the evidence is legally insufficient to support a conviction as a matter of law. As referenced above, the judgment adjudicating Appellant a "sexually violent predator" and order of civil commitment in cause number 08-07-06907-CV, **was reversed on appeal, and final prior to trial**. The civil judgment was set aside and new trial ordered. *In re Bohannon*, 379 S.W.3d 293, 300 (Tex. App.—Beaumont 2010) *aff'd*, 388 S.W.3d 296 (Tex. 2012), *cert. denied*, 133 S.Ct. 2746 (2013). The necessary proof to support a conviction as indicted under Health and Safety Code § 841.085 cannot be met as a matter of law, because in order to uphold the conviction there must be valid evidence and proof that Appellant was adjudicated a sexually violent predator. Health and Safety Code § 841.085; *Stevenson v. State*, 499 S.W.3d 842, 849 (Tex. Crim. App. 2016)

The elements of criminal non-compliance provide that a person commits an offense ***if a judicial ruling has been made as to whether the person is a sexually violent predator***, the person has been civilly committed as a sexually

violent predator, and the person violates any of § 841.082(a)'s requirements. *Stevenson v. State*, 499 S.W.3d 842, 849 (TEX. CRIM. APP. 2016).

The record contains no evidence of a valid adjudication; therefore, Appellant's conviction for violation of the civil commitment as referenced in cause number 08-07-06907-CV should not be upheld.

#### **E. 9<sup>th</sup> Court of Appeals' Opinion**

The 9<sup>th</sup> Court Appeals has expanded criminal responsibility under Health and Safety Code § 841.085 by saying Appellant's conviction should be affirmed because he had the "status of sexually violent predator," when the law is clear, he must be adjudicated a sexually violent predator.

The Memorandum Opinion from the Court of Appeals states:

While it was in effect, the judgment in the civil commitment case was not less enforceable because it was a judgment in a civil case. It is well established that a violation of a civil judgment may be punished as a criminal contempt even though the order is set aside on appeal. *In re Sheshtawy*, 154 S.W.3d 11, 125 (Tex. 2004) (Memorandum Opinion page 8)

**Bohannon had the status of a sexually violent predator** when he violated the civil

commitment order and the subsequent reversal of the judgment did not preclude prosecution for a violation of the order that occurred before the reversal of the trial court's judgment became final and the mandate of reversal issued. *See Jimenez*, 361 S.W.3d at 683; *Sheshtawy*, 154 S.W.3d at 125. (Memorandum Opinion p.16)

*Bohannon v. State*, No. 09-13-00090-CR, 2014 Tex. App. LEXIS 11825 (App.—Beaumont Oct. 29, 2014)

The Court of Appeals, cites *Ex Parte Jimenez*, 361 S.W.3d 679 (Tex. Crim. App. 2012) and *In re Sheshtawy*, 154 S.W.3d 114 (Tex. 2004) to support its "status" position that Appellant's conviction should be upheld even when Appellant's underlying adjudication as a sexually violent predator and resulting civil commit order was reversed. These cases do not apply to Appellant's type case and are otherwise distinguishable.

The Court of Criminal Appeal's recent decision in *Stevenson v. State*, 499 S.W.3d 842, 849 (TEX. CRIM. APP. 2016), made it clear that cases such as *Ex Parte Jimenez* and *In re Sheshtawy* do not apply:

this logic does not apply to civil-commitment order violations simply because the statute requires an "adjudication," not a "conviction."

Moreover, Appellant's material fact scenario is different than *Ex Parte Jimenez*. Appellant's underlying order of adjudication as a SVP was **reversed before** his trial started whereas in *Ex Parte Jimenez*, the applicant's predicate felony conviction was set aside **subsequent** to his conviction for unlawful possession of a firearm by a felon. *Ex Parte Jimenez*, 361 S.W.3d 679, 68. In addition, *In re Sheshtawy* does not apply because the predicate order in issue is a divorce decree not an adjudication as a SVP and the violation of the court order results in criminal contempt versus a serious enhanceable criminal felony offense as in Appellant's situation for which he received life in prison. See *In re Sheshtawy*, 154 S.W.3d 114 (Tex. 2004).

Health and Safety Code § 841.085 presumes a valid adjudication as a sexually violent predator, first, before there is a felony offense for violating the resulting orders of civil commitment. Appellant has not been adjudicated a "sexually violent predator." *In re Bohannon*, 379 S.W.3d 293, 300 (Tex. App.—Beaumont 2010) *aff'd*, 388 S.W.3d 296 (Tex. 2012), *cert. denied*, 133 S.Ct. 2746 (2013); (v2 R.R. 17). Surely, the legislature never intended under Health and Safety Code § 841.085 that an individual should be convicted and subjected to severe punishment

as a felon in a jury trial under Health and Safety Code § 841.085 without first being proof of a valid adjudication order in place.

**F. Violation of Due Process and Due Course of Law**

Appellant's criminal conviction violates his rights under United States Constitution 14<sup>th</sup> Amendment Due Process and Texas Constitution Due Course of Law Article 1 Section 19 and Code of Criminal Procedure Article 1.04, because if Appellant can be criminally prosecuted and sent to prison for violating civil-commitment requirements while his appeal of the civil-commitment case is still pending, and despite a reversal of such judgment and civil-commitment order before his trial, then his civil-commitment appeal is rendered moot and any errors that may have occurred at the civil-commitment trial (no matter how egregious) becomes inconsequential. This is fundamentally unfair and violates any notion of due process or due course of law. A valid judgment adjudicating Appellant a "sexually violent predator" and order of civil commitment are the foundation for holding Appellant criminally responsible under Health and Safety Code § 841.085; and without it the prison for criminal responsibility cannot be built.

**PRAYER**

Appellant, Michael Wayne Bohannon, respectfully requests that the Court of Criminal Appeals reverse the trial court's judgment of conviction and render a judgment of acquittal.

Respectfully submitted by,

/s/ Richard Martin P. Canlas

Richard Martin P. Canlas

Lawyer for Appellant

SBN: 90001843

300 West Davis, Suite 400

Conroe, Texas 77301

Tel: (936) 788-6999

Fax: (936) 539-5764

Email: r.canlas.esquire@gmail.com

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and complete copy of Appellant's Brief on Petition for Discretionary Review was on the 21st day of March 2017, electronically served by efile service on The Montgomery County District Attorney's Office, Bill Delmore, and State's Prosecuting Attorney, Ms. Lisa McMinn.

/s/ Richard Martin P. Canlas

Richard Martin P. Canlas

Lawyer for Appellant

**CERTIFICATE OF COMPLIANCE WITH RULE 9.4**

I hereby certify that this document complies with the requirements of Rule 9.4(i)(2)(B) of the Texas Rules of Appellate Procedure because there are 2,581 words in this document, excluding those portions of the document excepted from the word count rule under Rule 9.4(i)(1), as calculated by the word processing program used to prepare it.

/s/ Richard Martin P. Canlas

Richard Martin P. Canlas

Lawyer for Appellant